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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 52

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* EDGAR I. SHOTT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT

QUESTION PRESENTED

Whether, under the majority decision in *Linkletter* v. *Walker,* there is any justification for the reversal of the decision of the Court of Appeals granting habeas corpus to the Respondent.

COUNTERSTATEMENT OF THE CASE

Respondent, a member of the Bar of the State of Ohio, was convicted of a violation of the Ohio Securities Act, Ohio Rev. Code, §§ 1707.01-1707.45. The evidence produced by the State disclosed a single transaction in which Respondent had borrowed $2,000.00 from a friend. The sole creditor-witness testified that he had loaned Respondent the money strictly on the basis of his long acquaintance, personal friendship and his trust that Respondent would pay the money back. (Tr. 36, 37). Respondent gave the witness a note for $2,250.00 signed Shott Investment Co., Edgar I. Shott, Jr., payable in 60 days. The Shott Investment Company was a partnership of Edgar I. Shott, Sr., the Respondent's father, and Edgar I. Shott, Jr., personally and as trustee for his five-year-old son. (Tr. 22). The additional $250.00 represented interest at the rate of 12½ percent for the period of the note. (Tr. 36). The State's evidence further established that Respondent's note was repaid in full when due. (Tr. 33).

The entire testimony at the trial consists of less than 16 pages. (Tr. 23-39). The record reflects that there was no claim or evidence of fraud or impropriety in the single promissory transaction which was the subject of the Blue Sky prosecution. No evidence was introduced by the State that the promissory note which Respondent gave to his friend was part of a public offering of his promissory notes. Indeed, there was no evidence that Respondent had been involved in anything more than a single transaction.

Nevertheless, Respondent was convicted on two counts under the Ohio Securities Act: (1) for selling securities without being licensed as a securities dealer;

and (2) for knowingly selling an unlicensed security. Ohio Rev. Code § 1707.44(A); § 1707.44(C)(1). The method by which Respondent's conviction was obtained without proof of guilt was as follows: At the close of the State's case, counsel for Respondent rested without putting Respondent on the stand, believing that there was no proof in the record that the personal loan to the State's witness was part of a public offering of securities. Instead, Respondent's counsel moved for a directed verdict (Tr. 41). The motion was overruled. The trial court held that the State had made a *prima facie* case, relying on the provision in the Ohio Blue Sky Law which shifted the burden of proof onto the maker of a promissory note to establish it was *not* part of a public offering. Ohio Rev. Code § 1707.45. In practical effect, though not in form, this ruling amounted to a directed verdict in favor of the State. The court informed the jury that the Respondent in failing to go on the stand must be presumed to be guilty in spite of the fact that no rational inference of guilt could be drawn from the innocent and common transaction of borrowing from a friend on a promissory note.

In spite of this ruling, the prosecutor might still have failed to convict because the State's proof consisted only of a single transaction. This is because, in order to constitute a violation, the Ohio Blue Sky Law requires that there have been an unregistered public offering of securities. It provided that any particular "sale" of a security is exempt from the Law if "it is not made in the course of repeated and successive transactions of a similar character." Ohio Rev. Code § 1707.03(B). Moreover, by definition, a "dealer" is one who is engaged in "the ***business*** of the sale of

securities." Ohio Rev. Code § 1707.01(E)(1) (Emphasis added.) To meet these statutory requirements, the prosecutor supplied "proof" of multiplicity of transactions by his affirmative statements in his opening and closing statements to the jury. He told the jury that the Respondent's failure to take the stand was affirmative evidence against him. The prosecutor stated:

> Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, "You can't get me; you can't convict me." That is what he said.
>
> Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, "Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal." Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you, "Members of the jury, what I did was proper?" He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? *Because it's illegal today, and it was illegal in September of 1960.*

> Do you think this is a single transaction? Do you think this is the only time this occurred; that this piece of paper, this security was sold by Ed Shott? You have heard evidence of one . . .
>
> Appellant's counsel: I will object to that, Your Honor.
>
> The Court: Objection overruled. (Tr. 49) (Emphasis added.)

Toward the end of his closing statement, the prosecutor again told the jury that there was more than one transaction and that the proof of that fact arose from the Respondent's failure to take the stand:

> [The prosecutor] . . . How could you have proof, how could you learn whether or not there was more than one sale? You could learn it only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on that witness stand and look you in the eye and say, "Ladies and gentlemen of the jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito." He could tell you that, and he's got the burden of proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify. You take it yourself. You are charged with a crime and you don't do it. What you did you thought was legal, completely legal all the way, there was no problem, no hesitation in your mind, but that it was legal.
>
> Could any lawyer, any lawyer in this world, any Clarence Darrow, any Leibowitz, and Fallon, any Geisler, any lawyer will tell you to sit there, that you can't get up and tell this jury what is the truth? You would not; I would not. If the State of Ohio puts me in that chair and says I committed a crime that I didn't commit, you can bet your